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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1930.

No. 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP,

Petitioners,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

Decisions of the
Errors to be ur
Jurisdiction ...
Legislative histo
Opinion below.
Questions prese
Statement of th
Statutes involve
Summary of ar
I. Sections
not ap
fund
II. Whateve
611 it
made
ments
III. There ar
obliter
ing su
recove
IV. In any
ant a
within
fails t
the cl
V. Assumin
by a
Sectio
VI. Sections
277 (
tinguis
1917
filing

TABLE OF CONTENTS.

PAGE

the courts on these sections..... 6

e urged..... 6

..... 2

istory of Section 611..... 9

ow..... 1

resented..... 2

f the case..... 3

olved..... 5

f argument..... 14

ions 611 and 607 of the Revenue Act of 1928 do
t apply retroactively to any case where the re-
nd claim was filed prior to their enactment... 18

tever may otherwise be the effect of Section
1 it was not intended to apply to payments
ade under duress but only to voluntary pay-
ents 26

e are no words in Sections 607 and 611 which
literate an existing cause of action in a pend-
g suit against a collector in which the right to
covery existed when the suit was brought..... 29

ny event, Section 611 cannot avail the defend-
t as a defense unless he can bring himself
thin its terms. In the case at bar the record
ils to show that the collection was stayed by
claim in abatement..... 44

ning that stayed means delayed, not every stay
a claim in abatement is within the scope of
tion 611..... 52

ons 250 (d) of the Revenue Act of 1921 and
(a) (2) of the Revenue Act of 1924 ex-
guished the liability for taxes for the year
17 upon the expiration of five years from the
of the 1917 return..... 53

VII. Section 611 imposes no tax nor does it ratify the collection of a tax..... 59

VIII. Every court which has considered the question to date has decided that congress having extinguished a liability has no power to revive the same 64

IX. If Section 611 is construed as contended for by the government it further violates the Fifth Amendment because it is unreasonable and arbitrary... 66

Table of Cases Cited.

A

American Glue Co. v. United States, 42 Fed. (2d) 235.... 8
Angle v. Chicago, etc. Railway Co. 151 U. S. 1, 19..... 70

B

Bashara v. Hopkins, 290 Fed. 592 (Aff'd 295 Fed. 319).... 57
Bessemer Coal & Coke Co. v. Heiner, 39 Fed. (2d) 492..7, 21, 60
Bowers v. New York & Albany Lighterage Company, 273 U. S. 346.....4, 24, 35, 37, 39, 54, 59
Brewster v. Gage, 280 U. S. 327..... 20
Burden, Smith & Co. v. U. S. (D. C.) 32 Fed. (2d) 830..22, 52

C

Cary v. Curtis. 3 How. 236.....30, 31
Chapman v. United States 63, Ct. Cl. 424..... 38
Chelentis v. Luckenback Steamship Co. 247 U. S. 372, p. 384 69
Chicago Railway Equipment Co. v. Commissioner, 39 F. (2d) 378 48
Citizens Bank v. Miller Link Lumber Co. 16 Fed. (2d) 163 57
Clinton Iron & Steel Company v. Heiner, 30 Fed. (2d) 542 .....8, 21, 60
Converse v. United States, 21 How. 436..... 56
Cross v. Allen, 141 U. S. 528..... 54
Cutcheon v. Rafferty, 34 Fed. (2d) 708..... 7

D

Danzer, William & Co. Inc. v. Gulf & Ship Island R. R. Co. 268 U. S. 633.....55, 58, 65
Davis v. Mills, 194 U. S. 450.....55, 56
De Lima v. Bidwell, 182 U. S. 199..... 60
Diamond Alkali Company v. Heiner, 39 Fed. (2d) 643.... 7
Dobbins v. Commissioner, 31 F. (2d) 935..... 64

E

Ellay Company v. Bowers, 25 Fed. (2d) 637..... 36
Elliott v. Swartwout, 10 Pet. 137..... 30
Erie Coal & Coke Co. v. Heiner (D. C.) 33 Fed. (2d) 135.. 22
Ettor v. Tacoma, 228 U. S. p. 155..... 70

F

Farmers Feed Company, 10 B. T. A. 1069..... 48
Forbes Boat Line v. Commissioner, 258 U. S. 338..... 67
Forster v. Forster, 129 Mass. 559..... 68

G

Gilbert v. Ackerman, 159 N. Y. 118..... 70
Gillispie v. Commissioner (Board of Tax Appeals Docket 19832) 47
Gould v. Gould, 245 U. S. 151..... 22
Graham v. Dupont, 262 U. S. 234.....34, 57
Great Northern R. R. Co. v. Howser, 236 U. S. 702..... 49

H

Harrisburg, The 119 U. S. 199..... 55
Hall v. Smith, 2 Bing. 156..... 30
Heiner v. Erie Coal & Coke Company. 42 Fed. (2d) 214...6, 29
Hilgendorf v. Ostrom, 46 Ill. App. 465..... 23

I

Illinois Kaolin Company v. United States, No. 17672..... 8

J

Joy Floral Company v. Commissioner of Internal Revenue, 29 F. (2d) 865..... 56

K

Kepner v. United States, 195 U. S. 100, 124..... 43

L

Levy v. Wardell, 258 U. S. 542..... 29
Lincoln v. United States, 202 U. S. 484..... 23
Londoner v. Denver, 210 U. S. 373..... 51
Louisville v. Portsmouth Saving Bank, 104 U. S. 469..... 43

Mc

McLeod v. United States, 229 U. S. 416..... 61

M

Maryland Casualty Co. v. United States, 251 U. S. 342.....
Mascot Oil Co. v. United States, 42 F. (2d) 309..... 41
Mercantile Mutual Insurance Co. v. Folsom, 18 Wall. 237.. 49
Meriwether v. Garrett, 102 U. S. 472, p. 513..... 56
Morgan's Louisiana & Texas Railroad & S. S. Co. v. Cooke, 273 U. S. 656..... 58

N

National Carton Co. v. Reinecke, No. 36812..... 6
Neuland v. Bowers, 33 Fed. (2d) 842..... 33
Nichols v. Coolidge, 274 U. S. 531..... 67
North American Creamery Co. v. Willcuts, 38 Fed. (2d) 483 5

O

Oak Worsted Mills v. United States, 36 Fed (2d) 529.....7, 10

P

Peerless Woolen Mills v. Rose, 24 F. (2d) 576.....42, 64
Peninsula Produce Exchange v. New York P. & N. R. R. Co. 152 Md. 594, 137 Atl..... 33
Pepsin Syrup Co. v. Schwener, 35 Fed. (2d) 197.....7, 64

Pierce v. Brown, 7 Wall, 205 28
Pigott v. Poe, 41 Fed. (2d) 273 8
Pritchard v. Norton, 106 U. S. 132 70

R

Rafferty v. Smith, Bell & Co. 257 U. S. 226 ..... 59, 67
Raymond v. Chicago Union Traction Co. 307 U. S. 30, ante 78, 23 Sup. Ct. Rep. 7, 51
Reeves v. Anderson, 37 Fed. (2d) 373 District Ct. 7, 8, 10, 40, 46
Reynolds v. M'Arthur, 2 Pet. 417, 7 L. ed. 470 21
Russell v. United States, 278 U. S. 181 ..... 20, 21, 24, 54, 58

S

Sage v. United States, 250 U. S. 33 ..... 29, 63
Schell v. Fauche, 138 U. S. 564 31
Schlesinger v. Wisconsin, 270 U. S. 230 67
Schwab v. Doyle, 258 U. S. 529 20
Seaman v. Bowers, 279 Fed. 271 4
Selma R. & D. Co. v. United States, 139 U. S. 560 50
Smietanka v. Indiana Steel Company, 257 U. S. 1 ..... 29, 31
Smallwood v. Gallardo, 275 U. S. 56, 48 S. Ct. 23 70
Somerville v. Hamilton, 4 Wheat. 230 49
Southern Lumber Company v. U. S. .. Fed. (2d) 64
State v. Harmon, 57 W. Va. 447, 50 S. E. 828 22
State v. Jorgenson, 25 N. D. 539, 142 N. W. 450 23
Stevens v. Biddle, 298 Fed. 209 at p. 212 33
St. Louis Iron Mountain & S. R. Co. v. Craft, 237 U. S. 648 9
Sugarland Industries, The v. Bass, 36 Fed. (2d) 375 7

T

Taft Woolen Co. 38 Fed. (2d) 699 59
Thornton Wagon Company v. Noel, 17 Fed. (2d) 407 (D. C. Ga.) 36, 42, 43
Tuxaway Mills v. United States, 61 Ct. Cl. 363 ..... 34, 35, 37, 39

U

Union Pacific R. R. Company v. Laramie Stock Yards Company, 237 U. S. 190 21
United States v. American Sugar Ref. Co. 202 U. S. 563, 577 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717 21
United States v. Barth, John Co. 279 U. S. 370 ....41, 45, 57, 64
United States v. Burden, Smith & Company, 33 Fed. (2d) 229 ..... 6, 8, 9
United States v. Chandler-Dunbar Co. 309 U. S. 447 58
United States v. Denver & Rio Grande R. Co. 191 U. S. 84. 50
United States v. Emery, Bird, Thayer Realty Co. 237 U. S. 28 31
United States v. Ewing, 237 U. S. 197, 200 56
United States v. Heinszen & Co. 206 U. S. 370 ..... 59, 67
United States v. Heth, 3 Cranch 413, 2 L. ed. 483 21
United States v. Jones, 218 Fed. 273 50
United States v. Lee, 106 U. S. 196 29
United States v. Magnolia Petroleum Company, 276 U. S. 160 ..... 20, 21
United States v. Merriam, 263 U. S. 179 23
United States v. Oregon Short Line R. Co. 160 Fed. 526 ... 40
United States v. Poland, 251 U. S. 221 40
United States v. Updike, 281 U. S. 489, p. 496 50
United States v. Yount, 267 Fed. p. 801 40

W

Wagner v. Baltimore, 239 U. S. 207 40
Washington v. Miller, 235 U. S. 422 32
Weitengel v. Robinson, 289 Pa. 525; 136 Atl. 673 64
Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518 33 Sup. Ct. Rep. 273 21
Winona & St. Peter Railroad Co. v. United States, 165 U. S. 463 33
Wood v. Carpenter, 101 U. S. 135, p. 139 34
Woodward Co., L. H. v. Anderson, 34 Fed. (2d) 709 8
Wright & Taylor v. Lucas, 34 Fed. (2d) 328 8
Wyman, Partridge & Company v. United States, 41 Fed. (2d) 886 ..... 7, 59, 64

Statutes and Miscellaneous.

American Bar Association Reports, Vol. 54, 1929, p. 340..12, 13
Congressional Record,
Vol. 67, Part IV, page 3531.....34, 35
Vol. 69, p. 10136..... 12
Board of Tax Appeals, 13, 1119, pp. 1131, 1132..... 64
Corpus Juris, Sec. 61, p. 732..... 55
House Report
No. 356, 69th Congress, First Session, p. 55..... 35
No. 2, Ways & Means Committee.....38, 39
No. 2, 70th Congress, First Session..... 9
No. 960, 70th Congress, First Session, p. 42..... 10
No. 1882, 70th Congress, First Session, p. 22..... 11
Internal Revenue Cumulative Bulletin
VI-2 I. T. 2382 at page 102..... 37
Mimeograph 3660, July 27, 1928..... 27
VII-2 at page 82.....26, 66
VIII-1 G. C. M. 5665.....44, 45
VIII-1 G. C. M. p. 130..... 52
Revenue Acts of
1918 Sec. 23, Par. 14..... 45
Article 261, Regulations 33..... 46
Article 1032, Regulations 45..... 46
1921 Section 250(d) 34, 53, 54, 57
Article 1032, Regulations 62..... 46
1924 Sec. 277(a) (2)..... 54
1926 Sec. 1106(a) 15, 33, 57
1928 Section 507 20
Section 607 .....5, 19
Section 611 .....5, 18
Section 702 20
Section 716 5
Ruling Case Law,
.., Section 318, p. 353..... 55
25, Section 288, p. 1064.....

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Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINION BELOW.

The judgment of the United States District Court was rendered without written opinion. The opinion of the Circuit Court of Appeals for the Ninth Circuit reversing the District Court is reported in 35 Fed. (2d) 586.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered November 4, 1929 (R. 36). Petition for writ of certiorari was filed January 20, 1930, and the writ was granted March 3, 1930 (281 U. S. 708). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Are Sections 611 and 607 of the Revenue Act of 1928 (which was enacted May 29, 1928) retrospective in operation so as to destroy the right to a recovery where, as in this case, the claim for refund was filed and acted upon by the Commissioner of Internal Revenue before their enactment, and to obliterate an existing cause of action in a pending suit in which the right of recovery existed when the suit was brought?

2. Can these sections be successfully invoked by the respondent as a defense where there is no showing that the collection of the tax was stayed by the claim in abatement?

3. Even in cases where the collection of the tax was stayed by a claim in abatement but was not stayed by the claim until after the statute of limitations had run and after the rejection of the claim sufficient time remained in which to collect the tax before the running of the statute of limitations, do these sections apply?

4. If these sections operate retrospectively so as to obliterate an existing cause of action in which the petitioners had a clear right to recover at the time issue was joined therein, are they contrary to the Fifth Amendment to the Constitution?

STATEMENT OF THE CASE.

The facts in this case were stipulated and they appear at pages 11 to 14 of the record.

This stipulation shows that after the statute of limitations had run against the respondent's right to collect an income and profits tax from the petitioners he served a notice and demand on them to pay additional taxes in the amount of $7,034.71, together with interest in the sum of $2,004.69, totaling $9,039.40, and threatened to enforce and compel the payment of said taxes and interest by distraint and sale of petitioners' property. The petitioners, being unable to procure an injunction against the respondent, to prevent the seizure and sale of their property, did, under duress and protest, pay to the respondent the said sum of $9,039.40, making the payment in two installments, to-wit: the sum of $2,039.40 on November 29, 1924, and the sum of $7,000.00 on December 3, 1924.

The pertinent dates are as follows (R. 11-14):

March 22, 1918, return for 1917 was filed.
January, 1920, additional assessment made.
February 11, 1920, claim in abatement filed.
December 27, 1922, claim in abatement rejected.
March 22, 1923, expiration of five-year period for collection of tax.
November 19, 1924, notice and demand for payment of tax made.
November 29, 1924, and December 3, 1924, tax collected.
September 25, 1925, claim for refund filed.
January 13, 1926, claim for refund rejected.
December 23, 1927, suit commenced.

The District Court entered judgment for the petitioners, but upon appeal the Circuit Court of Appeals, in an

opinion reported in 35 Fed. (2d) 586, held that Section 611 of the Revenue Act of 1928, which had not been brought to the attention of the District Court by respondent, barred recovery in this case and reversed the judgment of the District Court.

It is undisputed that on March 22, 1923 the right of the respondent to collect any additional tax for 1917 from the petitioners became barred by the statute of limitations under the decisions of this court in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, and *Russell* v. *United States,* 278 U. S. 181, and that in collecting it he did an illegal act for which he became liable to petitioners under said decisions. At the time he collected this tax the respondent was advised not only by the petitioners' protest but also by the decision of the Circuit Court of Appeals for the Second Circuit in *Seaman* v. *Bowers,* 297 Fed. 371, decided March 17, 1924, that he was doing an illegal act.

The assessment was made in January, 1920, and on February 11, 1920, petitioners filed a claim in abatement. This claim in abatement was rejected December 17, 1922. After the rejection of this claim in abatement the respondent had three months, lacking five days, in which to collect the taxes from the petitioners before the statute of limitations on his right to collect them expired. He did not attempt to collect until November 19, 1924, or one year, ten months and twenty-two days after the rejection of the abatement claim, at which time he collected them from the petitioners by threats to seize and sell their property and by duress.

Petitioners filed a claim for refund on September 25, 1925 claiming that the money exacted from them was illegally and wrongfully and erroneously collected because of the statute of limitations. This claim was rejected by

the Commissioner on January 13, 1926. At the time the claim was filed and at the time it was rejected it was admittedly allowable under the law as it existed at that time.

The respondent says in defense that Sections 611 and 607 of the Revenue Act of 1928 grant him complete immunity for what he did.

STATUTES INVOLVED.

The statutes involved are Sections 607 and 611 of the Revenue Act of 1928, which was enacted May 29, 1928, and which are as follows:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 716. EFFECTIVE DATE OF ACT. Except as otherwise provided, this Act shall take effect upon its enactment."

ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Section 611 was retroactive to the extent of obliterating an existing cause of action in which the petitioners had a clear right to recover a judgment at the time said action was begun.

2. In failing to hold that Section 611 of the Revenue Act of 1928 did not apply to the case at bar because it did not appear therein that the collection of the tax, for the recovery of which the District Court had rendered judgment, was stayed by the claim in abatement.

3. In failing to hold that Section 611, if construed to deprive petitioners of the right to a judgment which clearly existed at the time the wrong was done by the respondent and at the time the issue was joined in the District Court in the case at bar, deprived petitioners of property without due process of law and was in violation of the Fifth Amendment to the Constitution of the United States.

Decisions of the Courts on These Sections.

The Circuit Courts of Appeal on these sections have divided two in favor of the taxpayer and two in favor of the Government.

The Circuit Courts of Appeal deciding in favor of the taxpayer are the Third Circuit in *Heiner* v. *Erie Coal & Coke Company*, 42 Fed. (2d) 214; and the Fifth Circuit in the case of *United States* v. *Burden, Smith & Company*, 33 Fed. (2d) 229. Both of these decisions affirm the decisions of the District Courts reported in 33 Fed. (2d) 135 and 32 Fed. (2d) 830, respectively.

The Circuit Courts of Appeal which have decided the question in favor of the Government are the Ninth Circuit in the case at bar (reversing the District Court) and in *Huntley* v. *Gile & Jenks*, 32 Fed. (2d) 857 (reversing the District Court reported in 29 Fed. (2d) 209); and the Second Circuit in the case of *Reeves* v. *Anderson*, ___ Fed. (2d) _____, affirming the District Court.

The United States Court of Claims decided in *Wyman, Partridge & Company* v. *United States*, 41 Fed. (2d) 886, that where the liability for the tax was extinguished these sections had no effect and, in another line of decisions of which the case of *Oak Worsted Mills* v. *United States*, 36 Fed. (2d) 529 is an example, decided that prior to the Revenue Act of 1926 the statute of limitations merely barred the remedy and did not extinguish the liability and consequently these sections were effective in such case. In this brief we endeavor to show that the statute of limitations prior to 1926 did extinguish the liability and that the distinction made by the Court of Claims as to payments made prior to the enactment of the Revenue Act of 1926 is due to a misapprehension of the law. No other court has made this distinction.

In the District Courts the decisions are in sharp conflict. Many unreported decision have been made. Among the reported decisions deciding the question in favor of the taxpayers are the following:

Pepsin Syrup Co. v. *Schwaner*, 35 Fed. (2d) 197.

Cutcheon v. *Rafferty*, 34 Fed. (2d) 708.

The Sugarland Industries v. *Bass*, 36 Fed. (2d) 375.

Diamond Alkali Company v. *Heiner*, 39 Fed. (2d) 643.

Bessemer Coal & Coke Co. v. *Heiner*, 39 Fed. (2d) 492.

Clinton Iron & Steel Co. v. *Heiner*, 30 Fed. (2d) 542.

Southern Lumber Company v. *U. S.*, ____ Fed. (2d) ____.

Judge FitzHenry, sitting in the Southern District of Illinois, decided in favor of the taxpayer in an unreported opinion on demurrer in the case of *Illinois Kaolin Company* v. *United States*, No. 17872 and Judge Carpenter, sitting in the Northern District of Illinois, entered judgment for the taxpayer in the case of *National Carton Co.* v. *Reinecke*, No. 36812.

In addition to the cases in the Court of Claims, the decisions in favor of the Government which we have been able to find are:

L. H. Woodward Co. v. *Anderson*, 34 Fed. (2d) 709.

Wright & Taylor v. *Lucas*, 34 Fed. (2d) 328.

Reeves v. *Anderson*, 37 Fed. (2d) 373.

North American Creamery Co. v. *Willcuts*, 38 Fed. (2d) 483.

Pigott v. *Poe*, 41 Fed. (2d) 273.

American Glue Co. v. *United States*, 42 Fed. (2d) 235.

We do not know of any unreported decisions in favor of the Government.

Before proceeding with the argument of the case, we desire to direct the Court's attention to the legislative history of Section 611 and for this purpose set forth the reports of the Committees of Congress. In doing so, we realize that the application of these reports to the case at bar is subject to the rule announced by the Circuit Court of Appeals for the Fifth Circuit in its decision on Section 611 in the case of *United States* v. *Burden, Smith*

& Company, 33 Fed. (2d) 229, which rule it stated as follows:

> "Reports of the Committees of the House and Senate may be looked to as aids in construing ambiguous or conflicting terms of the statute, but they cannot be taken as giving it a meaning not fairly within its words, *St. Louis Iron Mountain & S. R. Co.* v. *Craft*, 237 U. S. 648."

LEGISLATIVE HISTORY OF SECTION 611.

When what is now Section 611 was reported to the House, Report No. 2, 70th Congress, First Session, of the Ways and Means Committee, contained the following statement:

> Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer, even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.
>
> Your Committee appreciates the fact that this pro-

vision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment."

The foregoing report presented a section containing different provisions than that which eventually became law. The section presented with the above report actually did "withdraw the defense of the statute of limitations" by providing that amounts not yet collected might be collected within one year from the date of the passage of the Act. The fact that this did not become law has apparently been overlooked by some of the lower courts who quoted in their decisions in favor of the Government that part of the report which states that this section "merely withdraws the defense of the statute of limitations." (See *Reeves* v. *Anderson*, 37 Fed. (2d) 373, 377; and *Oak Worsted Mills* v. *United States*, 36 Fed. (2d) 529, 534.)

When the section as passed by the House went to the Senate it was eliminated from the Bill and in the report of the Finance Committee of the Senate concerning it, the following statement is made (Report No. 960, 70th Congress, First Session, p. 42):

"Section 611 of the House Bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts paid after the statute of limitations in such cases. Your Committee believes that the bar of the statute should be made effective as to both the Gov-

ernment and the taxpayer had recommends that this Section be eliminated."

In the House Bill as amended by the Senate, this section was eliminated and it then went to conference where it was the subject of much debate.

When the Bill came from the conference, the Managers on the part of the House (not the Senate) submitted a statement to the House (Report No. 1882, 70th Congress, First Session, p. 22) in which it was said:

"AMENDMENT No. 190: The House bill (Sec. 611) provided that in cases in which a tax was assessed within the period of limitations upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection."

In the conference report itself it was merely stated:

"that the House recedes from its disagreement to the amendment of the Senate No. 190, and agrees to the same with an amendment, as follows:"

(Here Section 611 as enacted was set out).

As we have said, there was a sharp debate between the Managers on the part of the House and the Managers on the part of the Senate concerning this section. The Senate Managers wanted nothing of the kind in the Act and the House insisted on the sections it had originally

passed. As a result a compromise was reached by which the Managers on the part of the House got from the Senate much less than they supposed they were getting.

One of the Managers on the part of the House, and one of the principal proponents of Section 611, Representative Garner of Texas, said with reference to 611 in the Congressional Record, Vol. 69, p. 10136:

> "* * * It means $30,000,000 refund of taxes and $70,000,000 to be collected in the future from taxpayers. That was the basis of the $100,000,000 loss. When we got into conference we could not get the Senate to recede. We finally tied up on two questions—the furniture outfit and 611. I believe in telling how we do these things. We tied up on them. We wanted the Senate to recede from both, but they did not want to recede because some particularly selfish people were going to get the money. We do not believe in that, but the Senate does. The result is that we compromised. We made it 'original', and then we struck out subsection (b) of section 611, cutting out the $70,000,000 prospectively we were going to get, *because there was some doubt about the constitutionality of it,* and decided to keep the $30,000,000 that we had in the Treasury. That was the compromise between those two amendments, one of them cutting down and the other giving up the prospect of securing $70,000,000 in the future." (Italics ours.)

It is suggested that Mr. Garner's understanding of what Section 611 ultimately provided was different from what the Senate thought it was conceding to the House. All of which illustrates the wisdom of the rule laid down by this court, that expressions of individual members are not to be considered in construing a law and that even reports of committees can not be taken as giving a law a meaning not fairly within its terms.

In the Reports of American Bar Association, Volume 54, 1929, at page 340 appears the report of the Special

Committee on Federal Taxation, and at page 343 thereof the following statement appears:

"In the commitee's report of last year (A. B. A. Reports, vol. 53, page 398) it was noted, among other committee recommendations adopted in the pending Revenue Act of 1928, that Section 611 of the House bill, reopening in favor of the government cases barred by the statute of limitations, where a claim for abatement had been filed, was eliminated from the Senate bill. Unfortunately, as mentioned in the oral submission of the committee's report (A. B. A. Reports, vol. 53, page 105), part of Section 611 was reinstated in the act by action of the Conference Committee. The vagueness and possible unconstitutionality of the provision, then foreshadowed, have already led to several court decisions, the majority assigning to it little effect. See *Clinton Iron & Steel Co.* v. *Heiner*, 30 Fed. (2d) 542 (U. S. D. C., W. D. Pa.); *Erie Coal & Coke Co.* v. *Heiner*, 1929 C. C. H. I. T. S., par. D-9079 (U. S. D. C., W. D. Pa.); *Burden, Smith & Co.* v. *United States*, 32 Fed. (2d) 830 (U. S. D. C., Macon Div., M. D. Ga.), affirmed 1929 C. C. H., I. T. S., par. D-9285 (C. C. A., 5 Circ.); and *Cutcheon* v. *Rafferty*, IV. U. S. Daily 1188 (U. S. D. C., E. D. N. Y.). Cf. *Gile & Jenks* v. *Huntley*, 29 Fed. (2d) 209 (U. S. D. C., D. Ore.), reversed 32 Fed. (2d) 857 (C. C. A., 9 Circ.).

SUMMARY OF ARGUMENT.

The argument made in this brief is divided into six parts. A decision on any one of these parts in favor of petitioners will dispose of the case. These parts are:

(1) Sections 611 and 607 do not apply retroactively to cases in which refund claims were filed before their enactment. Section 611 merely provides that in cases within it, a payment made before or within one year after its enactment "shall not be considered an overpayment" under the provisions of Section 607.

Section 607 refers to payments made before or after its enactment but in providing how those payments are to be considered and on what kind of refund claims such consideration is to be afforded them its language is purely prospective.

This court has said that the presumption that a statute is prospective is "resistless except against an intention imperatively clear" and no law will be given a retroactive effect unless such be "the unequivocal and inflexible import of the terms." There is no unequivocal, inflexible and imperative provision for retroactive effect in Section 607.

Where Congress intended in the Revenue Act of 1928 to refer to refund claims which had been filed before its enactment it used the words "has been" or "was filed" and further when it intended any sections of that act to have retroactive operation it placed the heading "Retroactive" before them or otherwise clearly so provided in unambiguous terms from which there was no escape.

In view of the opinion of so many Federal Judges that Section 611 is not retroactive it would seem the utmost the respondent can claim is that there is a doubt about

the matter and assuming (but not conceding) a doubt, the application of the rule requiring doubts in tax laws to be resolved in favor of taxpayers will be decisive.

(2) Section 611 was intended to refer only to voluntary payments and not to money illegally exacted by duress. It refers to payments made "before or within one year" after its enactment. The Senate eliminated a provision in the House Bill authorizing collections to be made within one year after its enactment and the House was forced to agree to the elimination. The Treasury Department has correctly ruled that payments "made within one year after the enactment of this Act" means voluntary payments only and that Section 611 does not authorize enforced collection.

There is no basis in the words of Section 611 for distinguishing payments made before from payments made within one year after its enactment. A contract made under duress is no contract. A so-called payment exacted by duress is void and is no payment. When Section 611 refers to the "payment" of Internal Revenue Tax it must be taken to use this term in its ordinary and legal sense and not to thereby refer to illegal exactions by duress but to refer to voluntary payments.

(3) Not a word in Section 611 makes reference to a suit in court. This section does not apply to suits in court but only to administrative refunds. It is merely a subsidiary of Section 607. The sole purpose of the enactment of Section 607 was to authorize administrative refunds of taxes paid after the Statute of Limitations had run, which Section 1106(a) of the Revenue Act of 1926 had been judicially construed to prevent and at the same time had been judicially construed to have no effect on court actions. The legislative history of Section 607 conclusively shows that it was enacted solely to authorize administrative refunds of taxes collected

after the Statute of Limitations had run. From this it follows that the utmost effect of Section 611 is to limit Section 607 and to prevent an administrative refund of taxes under conditions within the provisions of Section 611 leaving the complicated legal questions usually attendant upon such a situation as is embraced within Section 611 to be determined by the courts.

(4) The conditions described by Section 611 are conditions of fact. They are like all other facts, provable by evidence. Section 611, if it has the effect contended for by the respondent, is a defense to the action and for that reason the burden is on a defendant to prove it. The burden of proof is also cast upon the defendant by virtue of the general rule that he who relies upon an exception to the running of a Statute of Limitations has the burden of proving it.

Aside from these rules there is a further rule that facts peculiarly within the knowledge of a party must be proved by him. The reason the respondent delayed the collection of the tax in the case at bar is peculiarly within his knowledge and could easily and conveniently have been proved by him and the burden of making this proof is for that reason cast upon him. He has made no attempt to meet this burden and has not proved a defense.

(5) It is furthermore submitted that not every delay of collection caused by a claim in abatement is within the scope of Section 611. If an abatemnt claim was filed after the Statute of Limitations had run and then delayed the collection the Treasury Department concedes and it has been judicially decided that such delay is not within the scope of Section 611.

Even in cases otherwise within its terms, it is submitted that Section 611 was never intended to apply un-

less the abatement claim delayed the collection of the tax until after the Statute of Limitations on the right to collect it had run.

If after the rejection of the abatement claim plenty of time remained before the limitation expired, to collect the tax and its collection was delayed for some other reason the case is not within the spirit and purpose of Section 611. The case at bar is such a case because after the rejection of the abatement claim and before the Statute of Limitations had run ample time remained to collect the tax.

(6) If construed as contended for by the respondent Section 611 violates the Fifth Amendment for any of the following reasons which are fully developed in the argument:

(a) It is arbitrary and unreasonable.

(b) It has the effect of recreating a liability which had long prior to its enactment been extinguished by statute.

(c) Without attempting to make the illegal taking of petitioners' property legal it attempts to retain it without paying them just compensation, thereby depriving them of their property without due process of law and by its unreasonable and baseless distinctions it denies them equal protection of the laws.

I.

SECTIONS 611 AND 607 OF THE REVENUE ACT OF 1928 DO NOT APPLY RETROACTIVELY TO ANY CASE WHERE THE REFUND CLAIM WAS FILED PRIOR TO THEIR ENACTMENT.

Whatever may be the effect of Sections 607 and 611 of the Revenue Act of 1928 with reference to claims filed after their enactment, it is submitted that so far as claims are concerned they are purely prospective, and refer only to refund claims filed after their enactment.

This point appears not to have been presented to any of the Courts which have decided cases involving Sections 607 and 611 against taxpayers. It is not considered in any of the opinions holding in favor of the Government.

It seems to us to be clearly conclusive and to dispose of this case, and the other points made and discussed herein are discussed merely due to an abundance of caution.

Section 611 standing alone has no effect. In order to emphasize this argument, we again set it forth:

> "SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

It appears that all this section provides is that under the circumstances stated a payment "made before or within one year after the enactment of this Act, shall not

be considered as an overpayment under the provisions of Section 607."

Section 607 is thus expressly incorporated in Section 611 and references must be made to it to determine the meaning of Section 611.

Although Section 607 refers to payments made before or after its enactment, yet its language is purely prospective with respect to providing how such payments shall be considered and on what kind of claims action under it shall be taken. For the convenience of the Court, we repeat this Section:

> "SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto **shall be considered** an overpayment and **shall** be credited or refunded to the taxpayer if claim therefor **is filed** within the period of limitation for filing such claims."

The words of this section "**shall be considered** an overpayment and **shall** be credited or refunded to the taxpayer if claim therefor **is filed** within the period of limitation for filing such claim," are purely prospective and manifestly do not refer to refund claims which had been filed before the Act was enacted. If Congress had intended to refer to such claims, it could easily have made the statute read "if claim therefor is or was filed," but it did not do so.

In the case at bar the claim had been filed and had been considered and disposed of by the Commissioner of Internal Revenue more than two years before the enactment of the foregoing section of the law, and suit for refund had been filed by the taxpayers before this section was enacted. Congress knew that many claims for re-

fund had been filed and denied prior to the enactment of the Revenue Act of 1928 and that many suits were then pending in Court and if it had intended to effect such cases it could easily have and would have said so.

Where Congress in the Revenue Act of 1928 intended to refer to refund claims which had been filed at the time it was enacted, it said so in language which was clearly retroactive. For example, Section 702 of the Revenue Act of 1928 provides:

> "Unless claim for refund or credit * * * *has been* filed by the estate before the expiration of the period of limitation for filing claims," (Italics ours)

In Section 507 of the Revenue Act of 1928 where Congress intended to refer to claims for refund which had been filed, it used this language:

> "Unless claim for credit or refund, or the petition, *was filed* within the time prescribed." (Italics ours.)

While Section 607 seems clearly and beyond a doubt to refer only to refund claims filed after its passage, yet if it should require construction the rules to be applied have been frequently stated by this court. In *United States* v. *Magnolia Petroleum Company,* 276 U. S. 160, this court said at page 162:

> "Statutes are not to be given retroactive effect or construed *to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.*" (Italics ours.)

In *Russell* v. *United States,* 278 U. S. 181, at page 187 this court quoted the foregoing rule with approval and in *Brewster* v. *Gage,* 280 U. S. 327 at page 337, the court applied the same rule and in *Schwab* v. *Doyle,* 258 U. S. 529, the court said at page 537:

> "The statute should not be given retrospective operation unless its words make that imperative."

In *Union Pacific R. R. Company* v. *Laramie Stock Yards Company*, 237 U. S. 190, this court said at page 199:

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'. *United States* v. *Heth*, 3 Cranch 413, 2 L. Ed. 483; *Reynolds* v. *M'Arthur*, 2 Pet. 417, 7. L. Ed. 470; *United States* v. *American Sugar Ref. Co.*, 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; *Winfree* v. *Northern P. R. Co.*, 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. Rep. 273."

How can it be said in this case that "the unequivocal and inflexible import of the terms" is retroactive?

In *Bessemer Coal & Coke Company* v. *Heiner*, 39 Fed. (2d) 492, the Court said with reference to these very sections, 607 and 611:

> "Section 611 of the Revenue Act of 1928 (26 U. S. C. A. Section 2611) can only be made to apply to the instant case by giving it a retroactive effect. This should only be done when the legislative purpose to do so plainly appears, *United States* v. *Magnolia Co.*, 276 U. S. 160, 162, 48 S. Ct. 236, 72 L. ed. 509; *Russell* v. *United States*, 278 U. S. 181, 187, 49 S. Ct. 121, 73 L. ed. 255. There are no words in the act which can clearly be construed as a ratification of the collection of a tax which was barred by the statute of limitations at the time it was paid.
>
> The views as here expressed are in accord with the views of Judge Gibson of this court in *Clinton Iron & Steel Co.* v. *Heiner*, (D. C.) 30 F. (2d) 542; those of Judge McVicar of this court in *Erie Coal &*

Coke Co. v. *Heiner* (D. C.) 33 Fed. (2d) 135; and those of Judge Deaver of the District Court for the Middle District of Georgia, in *Burden, Smith & Co.* v. *U. S.* (D. C.) 32 Fed. (2d) 830, 831."

In *Gould* v. *Gould*, 245 U. S. 151, this court stated a firmly established rule of construction as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *United States* v. *Merriam*, 263 U. S. 179, the court said at page 187:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal form or expressions. *But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended beyond the clear import of the language used.* If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." (Italics ours.)

In view of the opinions of the learned district Judges and of the Circuit Court of Appeals for the Third Circuit holding that Sections 607 and 611 are not retroactive, it would seem that the most respondent can claim is that there is a doubt about the matter. If so, the rule of construction requires that it be resolved in favor of petitioners.

It is submitted, however, that there is no room for doubt because the words used with reference to overpayments and refund claims are purely prospective. The words are "shall" and "is".

In *State* v. *Harmon*, 57 W. Va. 447, 50 S. E. 828, a provision of the Code that no sale or deed of any real estate

"shall be set aside or in any manner effected by reason of the failure of any officer to perform any duty herein required to be done or performed by him after such sale is made", was held to be purely prospective. The court said that the word "is" did not relate to past sales, and that the statute was to be given prospective operation only.

In *Hilgendorf* v. *Ostrom*, 46 Ill. App. 465, at page 470, the Court held that the certificate of a clerk of the court that a certain person "is" a Commissioner duly authorized to take proof of acknowledgment of deeds was insufficient to show that he was a Commissioner at a previous time.

In *State* v. *Jorgenson*, 25 N. D. 539, 142 N. W. 450, 462 the court held that the word "is" is not synonymous with "shall have been."

Should anything be needed beyond the words themselves to demonstrate that "shall" and "is" are prospective, then attention may be called to the fact that sections of the Revenue Act of 1928 as enacted by Congress bear headings. Section 607 does not bear after its heading the word "Retroactive." When Congress intended in the Revenue Act of 1928 to make its sections retroactive it placed a heading "Retroactive" before such sections as were intended to have retroactive effect. (See Sections 702 to 706 of the Revenue Act of 1928) or otherwise clearly provided for a retroactive effect.

In *Lincoln* v. *United States*, 202 U. S. 484, the language was much stronger than the language of Section 607 with reference to refund claims and there was more basis for the contention that the law was intended to be retrospective. This Court gave the language a purely prospective construction and in support thereof said at page 498:

"This construction is favored by the consideration

that the suits had been begun when the Act * * * was passed and that even if Congress could deprive plaintiffs of their vested rights in process of being asserted * * * still *it is not to be presumed to do so on language which, literally taken, has a narrower sense.*

Moreover, the Act * * * was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubt at least had been thrown upon its power to ratify a tax under circumstances like the present. *DeLima* v. *Bidwell*, 82 U. S. 1, 199, 200. This affords a special reason for believing that if it had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape.

It should also be remembered that there was a powerful opposition in Congress, and that the phraseology of the act probably represents all that it was deemed safe to ask. *Every consideration requires that the ambiguous language of the Act should not be stretched beyond the exact and literal meaning of the words.*" (Italics ours.)

In the case at bar every consideration stated by the Court in the foregoing case is present, except that in the case at bar the words seem to be beyond doubt purely prospective and there seems no basis for the contention that they go to what action has been taken on refund claims filed prior to the enactment of the 1928 Act which action had been taken years before it was enacted.

When Sections 607 and 611 of the Revenue Act of 1928 had been enacted suits had been begun in which recovery was sought on the ground that the statute of limitations had run. Congress was fully aware of the decisions of this Court in the cases of *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, and *Russell* v. *United States*, 278 U. S. 181, allowing taxpayers to recover and if it had intended to divest and obliterate the right to recover in these pending suits, it certainly could have

plainly said so "in clear words from which there is no escape."

It should also be remembered that in this case there was a powerful opposition in Congress to the enactment of these sections. The Senate struck them out of the Bill and the Conferees finally compromised on these sections as enacted. As they stand they represent all that the House could get from the Senate and all "that it was deemed safe to ask."

Assume that the Revenue Act of 1926 made it illegal for the Commissioner to make a refund to a taxpayer on the ground that the statute of limitations had run. Suppose, however, he did make such refund late in 1926 and in 1927 filed a suit against the taxpayer to recover the money illegally refunded. Could the taxpayer set up Section 607 as a defense? We think not. It does not purport to be retroactive. The taxpayer in the assumed case would be met with the rule that the presumption that a law is prospective only, is "resistless except against an intention imperatively clear" (*Lynch* v. *Turrish*, 247 U. S. 221 at p. 230) and that the section would not be held retroactive unless, in the words of the court, "such be the unequivocal and inflexible import of the terms" and against these rules the other rule that all doubts are to be resolved in favor of a taxpayer and against the Government would not avail him.

II.

WHATEVER MAY OTHERWISE BE THE EFFECT OF SECTION 611 IT WAS NOT INTENDED TO APPLY TO PAYMENTS MADE UNDER DURESS BUT ONLY TO VOLUNTARY PAYMENTS.

It must be conceded by the Government that Section 611 does not authorize the collection of taxes where the circumstances specified by it exist. The legislative history of the Act set forth in this brief at pages 9 to 12 shows that a provision authorizing the collection of taxes under such circumstances within a period of one year after the date of the enactment of this section was stricken out by Congress.

The Treasury Department so recognizes in its ruling, Mimeograph 3660 published in Internal Revenue Cumulative Bulletin VII-2 at page 82, which provides in part as follows:

> "Section 607 and 611 do not authorize the Bureau *to enforce* collection of a tax *in any case* after the expiration of the period of limitations, but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto. Therefore, no attempt will be made *to enforce* collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

Section 611, however, does provide that a payment

"made before or *within one year after the enactment of this Act*" shall not be considered an overpayment.

In view of the fact that the section does not authorize the collection of taxes to be made within one year after its enactment, but does provide that payments made within one year after its enactment shall not be considered overpayments under Section 607, manifestly it merely refers to voluntary payments and not to collection enforced by threats and by duress.

The Treasury Department promptly and properly construed the words "payment within one year after the enactment of this Act" to refer only to voluntary payments.

In its Mimeograph 3660 issued on July 27, 1928 and published in Internal Revenue Cumulative Bulletin VII-2 at page 82 it says at page 85:

> "In cases falling within the scope of section 611, and collection of the tax has become barred, the following procedure will be observed:
>
> (a) The taxpayer will be advised by the Income Tax Unit of its rights under section 611 of the Revenue Act of 1928, and unless it is disposed to make voluntary payment, within one year after the enactment of the said Act, after a full understanding of the meaning of such section, an appropriate certificate of overassessment will be issued."

In view of the action of the Senate in refusing to consent to allow any taxes to be collected by threats and duress within one year after the enactment of the Act, the Department could have put no other construction on this section than that which makes it apply to voluntary payments as distinguished from illegal exactions.

Even where a taxpayer had overpaid the tax for another year the Department did not credit the overpayment against the liability which had become extinguished

by the Statute of Limitations under the circumstances described in section 611.

It is respectfully submitted that there is no reasonable basis for holding that that part of the law which refers to payments made within one year after the enactment of the Act refers to voluntary payments, while that part of it which refers to payments made before the enactment of the Act refers not only to voluntary payments but to illegal exactions.

In the ordinary sense of the word, money exacted from one by duress is not a payment at all and section 611 by its express words refers to "the payment" of "any internal revenue tax."

In *Pierce* v. *Brown,* 7 Wall. 205, this court said:

> "Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent."

If a contract procured by duress is void and no contract then a so-called payment collected by duress is void and is in reality no payment. This lends further support to the contention that the word "payment" in Section 611 was intended to mean a voluntary payment and was used by Congress in its legal sense.

If a man should point a revolver at your honor on the street and order you to hand over your money to him, it could not be said that you had made a payment to him, in the ordinary sense of the word. If a Collector by threats to seize and sell petitioners' property and ruin their business exacts money from them by force of the distress warrant which he holds in one hand, they have not made a payment to him in the ordinary sense of the word any more than one makes a payment to the bandit who without warrant of law, holds him up at the point of a pistol.

In *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542, the court adopts this view of section 611, saying:

> "If it has any retroactive force it is in respect to a demand upon the United States for the return of an amount voluntarily paid, and not in connection with a personal suit theretofore brought against a Collector of Internal Revenue to recover an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

And the Circuit Court of Appeals for the Third Circuit in *Heiner* v. *Erie Coal & Coke Company*, 42 F. (2d) 214, says that it concurs in the reasoning of the District Court in *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542.

Other Federal Judges are of the same opinion.

III.

THERE ARE NO WORDS IN SECTIONS 607 AND 611 WHICH OBLITERATE AN EXISTING CAUSE OF ACTION IN A PENDING SUIT AGAINST A COLLECTOR IN WHICH THE RIGHT TO RECOVERY EXISTED WHEN THE SUIT WAS BROUGHT.

The case at bar is not an action against the United States.

It is firmly established by decisions of this Court that an action against a Collector is in no effect a suit against the United States. (See *Sage* v. *United States*, 250 U. S. 33; *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1 and *Levy* v. *Wardell*, 258 U. S. 542.)

Actions against Collectors of Internal Revenue and against officers of the United States for wrongful acts exist by virtue of the rules of the common law. *United States* v. *Lee*, 106 U. S. 196. They are not exempt from

personal liability because they purport to act for the United States in doing the wrong. All public servants are creatures of the law and if they go beyond it they are answerable. This rule is more applicable in a country where public officers are public servants than in one where they are public masters. Even in England where the rule was "the King can do no wrong" the agents and officers of the King were held accountable for illegal acts (*Hall* v. *Smith,* 2 Bing 156; 9 J. B. Moore, 266, 2 L. J. C. P. 113) and this rule was a part of the common law adopted in this country.

Long before the creation of the Court of Claims and long before taxpayers were given the right of action against the United States for the recovery of taxes, this Court affirmed their right to a personal cause of action against the Collector. (*Elliott* v. *Swartwout,* 10 Pet. 137 decided in 1836.)

In 1839 (5 Stat. 348 ch. 82, sec. 2) Congress passed an Act requiring the Collector to pay into the Treasury all sums collected without retaining any, awaiting "the result of any litigation in relation thereto" and provided that when "it shall be shown to the satisfaction of the Secretary of the Treasury * * * more has been paid than the law requires he shall draw a warrant for it." This Court held in *Cary* v. *Curtis,* 3 How. 236, that by this Act Congress had substituted an administrative remedy for an action in the courts against the Collector and inasmuch as Congress had the right to substitute an administrative for a judicial remedy an action against the Collector could no longer be maintained. This decision was made over the dissent of Mr. Justice Story.

A sharp and vital distinction is to be taken between that case and the case at bar. In the case at bar, if the law, as contended for by the Government, abrogates the

right to sue the Collector, Congress has substituted no other remedy. It is submitted that the only way Congress can do this is by ratifying or reimposing the tax and this it has not done in the case at bar. Manifestly sections 607 and 611 impose no tax. They say nothing about ratification.

That Congress did not intend to substitute an administrative for a judicial remedy by the Act of 1839 is shown by the fact that when it learned the decision in *Cary* v. *Curtis,* 3 How. 236, had been made, it passed the Act of February 26, 1845 (5 Stat. 727) wherein it gave taxpayers by clear and unambiguous language the right to maintain an action at law against the Collector and thereby repealed the effect of the decision in *Cary* v. *Curtis,* 3 How. 236, and restored the action against the Collector to its common law basis (see *Schell* v. *Fauche,* 138 U. S. 564).

In *United States* v. *Emery, Bird, Thayer Realty Co.* 237 U. S. 28, this court said at page 31:

> "The right to sue the Collector for an unjustified collection was given by the common law."

In *Smietanka* v. *Indiana Steel Company,* 257 U. S. 1, the court said at page 4:

> "Later statutes, however, recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to the successors, as was held in this case, the formal defendants being saved from harm by the United States. This, however, is not the language of the statutes, and hardly can be reconciled with the decision of this court in *Sage* v. *United States,* 250 U. S. 33, and other cases to which we shall refer."

It must be admitted that there are no words in Sections 611 and 607 which expressly obliterate a right to recover in a pending action at law against a Collector of

Internal Revenue or purport to take away the right to sue a Collector. Section 611 merely provides that in the circumstances stated a payment of tax "shall not be considered as an overpayment under the provisions of Section 607."

In order to avail himself of Section 611 as a defense it becomes incumbent on the respondent to show that this section clearly and beyond a doubt took away taxpayers existing and vested right to recover a judgment against him and granted him immunity for his wrongful and illegal act.

In view of the language of Section 611 it seems to us that the respondent can sustain this burden only by showing that recovery could not have been had against him except for the provisions of Section 607 and that petitioners' suit is based upon Section 607. For the reason previously stated, petitioners' suit was not and could not have been based upon Section 607. It was filed and issue was joined therein before that section was enacted. That section says nothing about actions in court or about Collectors of Internal Revenue. When section 607 was enacted petitioners were clearly entitled to recover under pre-existing law. Section 607 does not expressly purport to amend existing law. There is nothing in it which supplants, modifies, qualifies or derrogates from the provisions of the Revised Statutes or from the provisions of the Common Law. It should not be extended by construction beyond "the exact and literal meaning of the words".

Whenever Congress, in the Revenue Act of 1928 intended to amend the provisions of the Revised Statutes it appears to have clearly so provided, by express reference to those statutes. (See Revenue Act of 1928, sections 613, 615, 425.)

If Sections 607 and 611 do not expressly amend existing law do they amend or repeal it by implication?

The rule as to repeals by implication is thus stated in *Stevens* v. *Biddle*, 298 Fed. 209 at p. 212:

> "* * * It is a well-settled canon of construction that repeals by implication are not favored, and will not be held to exist, if there is any other reasonable construction; and if a former act can be harmonized with a later one, it is the duty of the court to enforce it".

In *Washington* v. *Miller*, 235 U. S. 422, the court said:

> "* * * such repeals (by implication) are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both."

There is no irreconcilable conflict between the statutes here under construction and pre-existing law.

Why, then, was Section 607 of the Revenue Act of 1928 enacted?

The events which lead up to the enactment of Section 607 of the Revenue Act of 1928 *conclusively show that Section 607 was merely intended to remove doubt as to the right of the Commissioner to make administrative refunds of taxes collected after the statute of limitations had run on the ground that they were so collected.* Doubt had been cast upon this right by the following provision of Section 1106 (a) of the Revenue Act of 1926:

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax".* (Italics ours.)

The following legislative history of this section conclusively shows that Congress considered that part of it which extinguished the liability to be merely declaratory

of pre-existing law and intended to allow a taxpayer from whom taxes had been collected after the limitation had run to recover in court actions.

In *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, decided December 7, 1925, the Court of Claims held that Section 250(d) of the Revenue Act of 1921 merely barred the remedy and did not extinguish the liability, and if taxes were collected by a Collector after the Statute of Limitations had run, they could not be recovered by taxpayers in a suit against the United States. Obviously this was contrary to the doctrine laid down by this court in *Graham* v. *Dupont*, 262 U. S. 234, in which the taxpayer sought an injunction on the ground that there was no adequate remedy at law, but this court reversed the decision allowing the injunction, and held that the taxpayer's remedy was to pay the tax and bring suit to recover it. In that case the government had said in its brief that this remedy at law was plain, adequate and complete.

Nevertheless, this decision of the Court of Claims caused many taxpayers to be disturbed and Congress attempted to remedy it by Section 1106(a) of the Revenue Act of 1926, which was incorporated in the House Bill as an amendment by the Senate. In support of this amendment, Senator Reed made the following statement (Congression Record, Volume 67, Part IV, page 3531):

> "Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the Collector may nevertheless issue his distraint, and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposter-

ous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now."

The Report of the House Conferees, who reported out the amendment in its final form, contained the following explanation:

> "This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *United States*) although in a case presenting the specific point, this opinion would probably not be followed by the Supreme Court. (See Taft C. J.; In *Graham* v. *Dupont*, 262 U. S. 234, 256, 258." (House Report No. 356, 69th Congress, First Session, p. 55).

This Court granted Certiorari in the case of Toxaway Mills on March 8, 1926 (270 U. S. 637), (after the enactment of the Revenue Act of 1926) and the Solicitor General confessed error and this Court reversed the case in 273 U. S. 781 on March 14, 1927.

The decision of this Court reversing the case in 273 U. S. 781 being made after the enactment of Section 1106(a), amounted to a judicial decision that Section 1106(a) did not prevent recovery in a suit against the United States the basis of which was the illegal collection of the tax after the statute of limitations had run. In a suit against a collector, the case of *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S. 346 was like authority.

Notwithstanding that the legislative history of Section 1106(a) of the Revenue Act of 1926 conclusively shows that the intent of Congress in enacting it was to reverse the decision of the Court of Claims in the case of Toxaway Mills (which held that Section 250(d) of the

Revenue Act of 1921 only barred the remedy but did not extinguish the liability and that taxpayers from whom a tax was collected after the running of the statute of limitations could not recover it) and notwithstanding that the sole purpose of Section 1106(a) was to clarify the right of such taxpayers to recover in lawsuits, nevertheless when this case came back to the Court of Claims on the reversal mandate of this Court, that court in 63 Ct. Cl. 646 intimated that if it were not bound by the mandate of this Court it would make a contrary decision because of Section 1106(a) of the Revenue Act of 1926, and in *Chapman* v. *United States,* 63 Ct. Cl. 424, it did make such contrary decision holding that Section 1106(a) of the Revenue Act of 1926 prevented a taxpayer recovering in a suit on the ground that the statute of limitations had run and raffirming the said doctrine advanced by it in the case of Toxaway Mills, which decision the foregoing legislative proceedings conclusively show Section 1106(a) was intended by Congress to reverse and which case this court did reverse. The Court of Claims persists in that construction to this day.

In *Thornhill Wagon Company* v. *Noel,* 17 Fed. (2d) 407 (D. C. Ga.) at page 409, the Court construed Section 1106(a) as applicable only to refunds by the Commissioner and not to suits in Court against the Collector and in *Gove* v. *Nichols,* 23 F. (2d) 856 (D. C. Mass.) this holding was concurred in.

In *Ellay Company* v. *Bowers,* 25 Fed. (2d) 637 (certiorari denied 277 U. S. 606), the Circuit Court of Appeals for the Second Circuit held that Section 1106(a) "in no wise effects the apparent remedy at law to sue for recovery of taxes after payment".

The conclusion of the Circuit Court of Appeals for the Second Circuit was undoubtedly correct and the conclu-

sion of the Court of Claims was clearly wrong in the light of the legislative history of Section 1106(a) and of the reversal of the Court of Claims decision in the case of the Toxaway Mills by this court.

The words used are "refunds" and "credits". Collectors of Internal Revenue have no authority to allow "refunds" and courts do not allow "credits" or make "refunds".

These words denote administrative action.

The Commissioner of Internal Revenue seemed to think that the right of recovery of taxpayers adjudicated by this Court in the case of *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, "should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner."

In I. T. 2382, published in C. B. VI-2 at page 102, he published the following:

> "Many inquiries are being received both from within and without the Bureau as to the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of *Bowers* v. *New York & Albany Lighterage Co.*
>
> Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the New York & Albany Lighterage Co. decision may have no application to cases where bonds were filed or where claims in abatement were filed, and that, in view of section 1106 of the Revenue Act of 1926, the decision should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner. Furthermore, section 1106 was not raised in the Albany Lighterage Co. case and was not considered in connection with the confession of error made by the Government in the Toxaway Mills case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the Albany Lighterage Co. decision to other cases in view of Section 1106.

In view of the great uncertainty as to the whole matter, it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the Albany Lighterage Co. decision unless and until the situation is clarified by further court decisions or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation, and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

In accordance with the above pronouncement made by the Commissioner in 1927, he refused until the enactment of Section 607 of the 1928 Act to make administrative refunds of taxes collected after the statute of limitations had run and left taxpayers to their remedy by suit.

Section 607 of the Revenue Act of 1928 was not enacted to amend the provisions of the Revised Statutes dealing with suits against collectors, nor to amend the provisions of the statute dealing with suits against the United States, but was enacted solely to permit the Commissioner of Internal Revenue to make administrative refunds of taxes collected after the statute of limitations had run, which refunds he had refused to make since 1927. Such being its sole purpose how can it be said to affect suits in court?

Report No. 2 of the House of Representatives, 70th Congress, First Session, presented by the Ways and Means Committee which submitted Section 607 of the Revenue Act of 1928 reads as follows with reference to this section:

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax

or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Sec. 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Sec. 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under Section 1106 (b) of the 1926 Act or section 606 of the new Bill."

All of the foregoing shows that Section 607 was not intended to and did not purport to amend the Revised Statutes pertaining to suits against Collectors, or to amend the statutes pertaining to suits against the United States and under that construction of pre-existing law by this court in the case of *Bowers* v. *New York & Albany Lighterage Company* and *Toxaway Mills* v.

United States, both of which were decided after the enactment of Section 1106 (a) of the 1926 Act and before the enactment of Section 607, it conferred no rights on taxpayers so far as court actions were concerned which did not exist before its enactment.

In view of Section 611 being merely a limitation on Section 607, it is submitted that unless the provisions of these sections be extended beyond the plain meaning of the words, they do not obliterate the right of recovery in actions at law against Collectors of Internal Revenue which were pending when said sections were enacted, and the greatest extent to which they go is to prohibit the Commissioner of Internal Revenue allowing refund claims filed subsequent to the enactment of Section 607.

In an effort to have this court extend these sections beyond their words the respondent may answer this contention as did the Court in *Reeves* v. *Anderson,* ____ Fed. (2d) ____, saying it should not prevail for two reasons, viz.: (a) Section 3226 of the Revised Statutes requires the filing of a claim for refund as a condition precedent to suit against the Collector and it would be an unusual thing to require as a condition precedent an application which could not be granted, and (b) "It is difficult to conjure any reasons which Congress could have had for obliterating the more commodious way for settling such controversies, and still exposing the Treasury to actions of law which would result in exactly the same thing."

The answer to the argument first advanced is obvious. Section 3226 is a general statute and Congress could easily have overlooked the necessity of amending it to take care of isolated exceptions and did so in at least one other instance. This is apparent when the provisions of Section 284 (c) of the Revenue Act of 1926, which is still

the law, are considered. The section provides that in case a taxpayer's invested capital is decreased by the Commissioner because the taxpayer failed to take adequate deductions in any prior year, a refund shall be made by the Commissioner of Internal Revenue "without the filing of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) or (g) has expired."

Although this section does away with the necessity of filing a claim for refund where the situation it specifies exists, yet Congress did not expressly amend Section 3226 of the Revised Statutes to do away with the necessity of filing a refund claim as a condition precedent to suit.

In answer to the statement that "it is difficult to conjure any reason which Congress could have had for obliterating the more commodious way of settling such controversies and still exposing the Treasury to actions of law which must result in exactly the same thing" it may be said that it is based on the premise that a reason is always to be found for what Congress does. Experience has demonstrated the contrary.

However, a substantial reason can be found for prohibiting the Commissioner making refunds in cases where collection was delayed by an abatement claim until after the limitation had run. The question as to the taxpayer's right to a refund was purely legal. In the overwhelming majority of such cases a bond had been entered into by the taxpayer (*United States* v. *John Barth Co.* 279 U. S. 370) and in other cases money or liberty bonds had been deposited in escrow under an escrow agreement (*Mascot Oil Co.* v. *United States*, 42 F. (2d) 309). In such cases the question whether the taxpayer was entitled to a refund was extremely technical and

called for a knowledge of the law of suretyship and for a construction of escrow agreements. This situation did not exist in the case of ordinary payments made after the Statute of Limitations had run.

Congress has disclosed some jealousy of administrative refunds as evidenced by frequent debates and by the provisions of Section 710 of the Revenue Act of 1928 which provide that "no refund or credit" in excess of $75,000.00 shall be made until a report of it has been filed for 30 days with the Joint Committee on Internal Revenue Taxation. This provision has never been construed by the Department or by the Committee to relate to payments made pursuant to court judgments.

Its legislative history shows that Section 607 was enacted to authorize administrative refunds of taxes voluntarily paid after the statute of limitations had run (in *Peerless Woolen Mills* v. *Rose*, 24 F. (2d) 576, *Thornhill Wagon Co.* v. *Noel* 17 F. (2d) 407 and *Gove* v. *Nichols*, 23 F. (2d) 856, it had been held that Section 1106(a) prohibited such refunds). Section 611 was merely a limitation on Section 607 and did not purport to be anything else. In harmony with its intention to prohibit administrative refunds in cases within the scope of Section 611 Congress amended R. S. 3220 by Section 619(b) of the Revenue Act of 1928 to read that the Commissioner was authorized to make refunds "except as otherwise provided by law". R. S. 3220 relates solely to the authority of the Commissioner to make refunds. In harmony with its intention not to affect suits, Congress left untouched R. S. 3226 relating to suits for the recovery of taxes.

The Revenue Act of 1928 was approved at 8 A. M. on May 29, 1928. In the afternoon of the same day Congress passed Chapter 901, within re-enacted R. S. 3220

but omitted "except as otherwise provided by law". It seems fully as logical for the taxpayer to argue that by omitting this exception Congress impliedly repealed Section 611 of the Revenue Act of 1928 as it does for the respondent to argue that pre-existing law was impliedly repealed or amended by Section 611. It is the rule that where necessary to justice to do so the law will take account of parts of a day (*Louisville* v. *Portsmouth Saving Bank*, 104 U. S. 469).

While it is a rule stated by this court that the reports of Committees of Congress cannot be taken as giving Sections 607 and 611 a meaning not fairly within their words (see page 9 of this brief) yet it is submitted that there is nothing in these reports which is not perfectly consistent with a construction that Section 607 and 611 deal solely with administrative refunds made on claims filed subsequent to their enactment and have no effect on suits in court.

Reports of these Committees say nothing about suits in court. They refer to "refunds and credits" which, it must be presumed, were known to the Committees to be administrative acts of the Commissioner of Internal Revenue.

As above stated the words "no credit or refund shall be allowed" in Section 1106(a) of the 1926 Act were construed in *Thornhill Wagon Co.* v. *Noel*, 17 F. (2d) 407 and *Gove* v. *Nichols*, 23 F. (2d) 856, to relate solely to administrative refunds and when Congress used substantially the same language in the 1928 Act it must be presumed to have used it with full knowledge of and acquiescence in the construction theretofore placed upon those words by the courts (*Kepner* v. *United States*, 195 U. S. 100, 124).

Because the questions involved in the situation de-

scribed by Section 611 were purely legal and extremely technical Congress, which has frequently expressed its jealousy of administrative refunds, may well have thought that these legal questions should be determined by the courts.

IV.

IN ANY EVENT, SECTION 611 CANNOT AVAIL THE DEFENDANT AS A DEFENSE UNLESS HE CAN BRING HIMSELF WITHIN ITS TERMS. IN THE CASE AT BAR THE RECORD FAILS TO SHOW THAT THE COLLECTION WAS STAYED BY THE CLAIM IN ABATEMENT.

The Circuit Court of Appeals in its opinion in the case at bar says:

> "The title of the section under consideration (26 USCA 2611) can be referred to for the purpose of determining the proper interpretation of the section (*Church of Holy Trinity* v. *United States*, 143 U. S. 457, 462). The title of this section is 'Collections Stayed by Claim in Abatement'. Congress evidently intended to cover cases where actual delay had resulted from the filing of a claim in abatement."

With the above statement of the Circuit Court of Appeals, we are thoroughly in accord. Throughout the Revenue Act of 1928 Congress used headings to clarify the meaning of the sections and the heading of Section 611 is "Collections Stayed by Claim in Abatement". Assuming that "stayed" means merely a delay, we submit that the delay on the part of the Collector must have been due to the claim in abatement and not to some other reason, that is, in the words of the Circuit Court of Appeals in this case it must have "resulted from the filing of a claim in abatement." In other words the collection must have been "stayed by claim in abatement" and not by something else. The Treasury Department in its ruling G. C. M. 5665, published in C. B. VIII-1 at page 130, says:

> "The filing of a claim in abatement does not in and

of itself satisfy the provisions of that section (Section 611). Its provisions are applicable only if a timely assessment was made prior to June 2, 1924, and *if upon the filing of a claim in abatement, collection was stayed.* Here such a timely assessment was made, but collection of the tax became barred prior to the date of the filing of the claim. Consequently the legal right to enforce collection of the tax was never stayed, as the result of the claim being filed. The phrase 'collection * * * was stayed' as used in Section 611 clearing presupposes the legal right to collect, and the provisions of that section are not applicable when, if payment had been made at the time of the filing of the claim, it would have constituted an overpayment of the tax as defined by section 607." (Italics ours.)

In the case at bar there is no showing that the claim in abatement delayed the collection of the tax and consequently the defendant has not brought himself within Section 611.

Prior to the enactment of the Revenue Act of 1924 there was only one provision in the law for a stay upon the filing of an abatement claim and that was Paragraph 14 of Section 234 of the Revenue Act of 1918, which provided for the filing of a claim in abatement for the taxable year 1918 based on the fact that a substantial loss had been sustained arising from shrinkage in inventory, and further provided:

> "In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

This is the provision which was considered by this Court in the case of *United States* v. *John Barth Company*, 279 U. S. 370, and is quoted therein at pages 373 to 374. It could have no application to the case at

bar because it deals only with the year 1918, whereas the case at bar concerns the year 1917.

In the case at bar, there was no provision either of the law or of the regulations to prevent the Collector collecting the tax within the period of limitations. He might have done so at any time before or after the abatement claim was rejected.

It seems that the respondent must concede that after the claim in abatement was rejected it could have had no tendency to prevent the collection of the tax, nor did it necessarily prevent the collection of the tax while it was pending.

Article 261, of Regulations 33 (promulgated under the 1916 Act), Article 1032 of Regulations 45 (promulgated under the 1918 Act) and Article 1032 of Regulations 62 (promulgated under the 1921 Act) contained the following provision which was substantially the same in all of these regulations:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax, or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

This Court has held in *Maryland Casualty Company* v. *The United States*, 251 U. S. 342, that a regulation which is not contrary to law has the force of law.

Notwithstanding the above regulation, the Circuit Court of Appeals for the Second Circuit in *Reeves* v. *Anderson*, ____ Fed. (2d) ____ (pending herein on certroiari) says:

> "Regardless of the eventual burden of proof on the issue the presumption is that the delay was caused by the claim; and there was no proof to meet it."

It is respectfully submitted that to raise a presumption of this kind against taxpayers seems to be resolving doubts against them rather than in their favor and to be invoking a presumption against them for which there is no warrant in the common or statutory law and contrary to the provision of the regulations that "a claim for abatement does not necessarily operate as a suspension of the collection of the tax".

So far as the case at bar is concerned we assume (but do not concede) that the word "stay" as used in Section 611 does not mean an enforced stay such as is within the scope of Section 234 of the Revenue Act of 1918, before mentioned, but that it merely means "delayed" as held by the Ninth Circuit in the case at bar.

Assuming that it means "delayed" there is nothing in the case at bar to show that the collection was "delayed by claim in abatement" and not by some other thing such as a waiver, a bond, oversight, negligence or by the indulgence of the Collector.

As a matter of fact, many cases exist in which claims in abatement were filed but waivers and not the abatement claims delayed the collection of the tax until after the limitation ran. Then the waivers were often either carelessly or through a misunderstanding of the law allowed to expire before collection was made and it is now sought to retain such collections by virtue of Section 611. One such case was that of *Gillespie* v. *Commissioner* (Board of Tax Appeals Docket 19832). It appears in that case from the testimony of the Assistant to the Collector at Oklahoma City that even in cases where abatement claims were pending if the Statute of Limitations was about to run that office wrote letters to the taxpayers demanding waivers, and as to its practice the witness testified therein at the bottom of page 615 and the top of page 616 of the record lin that case, as follows:

"Well, when your office wrote our letters demand-

ing waivers, and stating that unless waivers were returned, your office would immediately proceed with the collection of the tax, in such cases, if no waivers were returned, what was your custom—to immediately proceed with the collection of the tax?

"A. Yes, sir.

"Q. Regardless of whether claims in abatement were on file or not?

"A. Yes, sir.

"Q. Then, it was the waivers that stayed the collection of taxes, that caused you to withhold collection, the signing of waivers, was it not, in such cases?

"A. As a general practice it was; I do not know about this particular case."

From the above it appears that in that Collector's office unless waivers were signed they would proceed with the collection of the tax and that as a general practice it was waivers and not abatement claims which caused the Collector to withhold the collection of the taxes. In that case these waivers were allowed to expire before collection was attempted and when collection was thereafter made it was sought to retain it by virtue of Section 611. The Board of Tax Appeals (opinion not yet reported) disposed of the situation by saying that the burden of proof was on the taxpayer to show that the claim in abatement did not stay the collection of the taxes.

This is contrary to the reasoning of the Board's opinion in the case of *Farmers' Feed Company*, 10 B. T. A. 1069, which holds that the burden of proving exceptions to the running of the Statute of Limitations (in that case waivers) is upon the Commissioner of Internal Revenue. This holding has been followed by the Board in many other cases and was approved by the Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago Railway Equipment Company* v. *Commissioner*, 39 F. (2d) 378.

If Section 611 has the effect contended for by the government, it is a matter of defense and the burden of proving it is on the defendant. Even in criminal cases where the proof must be beyond a reasonable doubt the burden of proving such defenses as insanity, provocation and self-defense is upon the defendant like the burden of proving all other defenses. (*U. S.* v. *Poland*, 251 U. S. 221; *Mercantile Mutual Insurance Co.* v. *Folsom*, 18 Wall. 237; *Great Northern R. R. Co.* v. *Hoosser*, 236 U. S. 702.)

When a plaintiff proves the date of filing the tax return and that more than five years elapsed before collection was made the plaintiff has made a prima facie case. If the defendant relies upon any exception to the operation of the Statute of Limitations, such as waivers or fraud, the burden is upon him to prove it.

In the early case of *Somerville* v. *Hamilton*, 4 Wheat. 230, this Court recognized and applied the general rule that an exception to the operation of the Statute of Limitations will not be presumed but must be proved by the party relying upon it.

As we have said, there are a great many other exceptions to the running of the Statute of Limitations besides Section 611 (if construed as contended for by the government) which the defendant might claim as a defense, such as a fraudulent return or waivers, but in tax practice it has always been considered and held that a fraudulent return or waivers were matters of defense to be proved by the defendant. Why make an exception to this rule for the facts embraced within Section 611?

In *United States* v. *Oregon Short Line R. Co.* 160 Fed. 536, the government was suing the railroad for a penalty. The railroad claimed that the plaintiff had not proved its case because it did not show the case was not within the excepting clause. The court said:

"Obviously it would be next to impossible for the

> government (plaintiff) to anticipate and by proof eliminate all the possible contingencies covered by the excepting clause. Even if it were held to be necessary for the plaintiff to plead against the exception, it might still be relieved from making proof, because it would thus plead a negative, and, further, because it pleads the absence of conditions, the evidence concerning which in many cases would be exclusively within the knowledge of the defendant."

The rules of common law pleading were interwoven with the rules of evidence. The following general principle is stated in Chitty on Pleading (16th ed. at page 318):

> "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, but if there be an exception in a subsequent clause, that is a matter of defense and the other party must show it to exempt himself from the penalty."

In the case at bar the Collector claims that after the suit was filed and after the issue was joined an Act of Congress was passed exempting him from liability under certain exceptional circumstances. The burden therefore is upon him to bring himself within the exception.

Furthermore, in all fairness the burden of proof should be upon the Collector because he alone knows whether he delayed the collection of the tax because of the claim in abatement or because of some other reason. If he delayed it because of the abatement claim it is easy and convenient for him to prove this fact. This Court has repeatedly applied the rule that where a fact is peculiarly within the knowledge of a party to litigation the law for that reason casts upon him the burden of proving it. (*Selma R. & D. Co.* v. *United States*, 139 U. S. 560, and *United States* v. *Denver & Rio Grande R. Co.* 191 U. S. 84.)

It is further submitted that to hold that whether the

collection of a tax was stayed by the abatement claim is a question of fact to be proven by evidence, is in harmony with the rules underlying the requirement of due process of law and its attendant and indispensable hearing. Only by construing Section 611 to make provision for a hearing to determine this fact can the "due process" clause be satisfied. The citation of authority is hardly necessary to sustain this statement.

In the tax case of *Londoner* v. *Denver*, 210 U. S. 373, the Court said at page 386:

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 171 *et seq.*, 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.
>
> "It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state. *Raymond* v. *Chicago Union Traction Co.* 207 U. S. 30, *ante*, 78, 23 Sup. Ct. Rep. 7. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error."

Nor should authority be necessary to sustain the proposition that if any question of fact be conclusively presumed against a litigant it is not due process of law because he is thereby deprived of a hearing on it.

V.

ASSUMING THAT STAYED MEANS DELAYED, NOT EVERY STAY BY A CLAIM IN ABATEMENT IS WITHIN THE SCOPE OF SECTION 611.

Section 611 does not expressly except any delay due to an abatement claim, yet if a claim in abatement was filed after the Statute of Limitations on the right to collect the tax had run and then delayed its collection, the Treasury Department itself concedes that Section 611 has no application. (G. C. M. 5665, VIII-1, p. 130.) Furthermore, the Honorable Solicitor General, in the days when he was a learned and distinguished District Judge in *Neuland* v. *Bowers*, 38 Fed. (2d) 842, so decided.

It is submitted that even in cases within the scope of Section 611 (*i. e.*, where refund claims were filed after its enactment) *that section should not be held applicable unless the claim for abatement caused the collection of the taxes to be delayed until after the Statute of Limitations had run.*

In *Burden Smith & Co.* v. *United States*, 32 F. (2d) 830, the court said at page 831:

> "There is apparently no logical or equitable reason for extending the time in all cases in which a claim in abatement was filed and there was a stay, without regard to the length of the stay."

Suppose a Collector had four years before the limitation expired to collect the tax from the date the taxpayer filed an abatement claim and this claim was rejected six months after it was filed leaving a period of three and one-half years in which to collect the tax, but the Collector did nothing because the case become lost in the thousands on his books. Although the government contends it is, we submit that Section 611 is not applicable to such a case.

No claim in abatement could possibly operate to delay

the collection of taxes any longer than a reasonable period after its rejection. In the case at bar the Statute of Limitations did not run on the Collector's right to make collection until March 22, 1923. The sixth paragraph of the stipulation shows that the claim in abatement was rejected on December 27, 1922. After the rejection of this claim, the Collector had three months, lacking five days, in which to collect the taxes before the Statute of Limitations on their collection had run. He did not attempt to collect them until November 19, 1924, or one year, ten months and 22 days after the rejection of the abatement claim, although he had a reasonable time after its rejection and before the expiration of the Statute of Limitations within which to make collection:

Some of those courts which have sustained the government in its view of Section 611 have said that it was intended to apply:

> "to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him."

The case at bar is not such a case.

VI.

SECTIONS 250 (d) OF THE REVENUE ACT OF 1921 AND 277 (a) (2) OF THE REVENUE ACT OF 1924 EXTINGUISHED THE LIABILITY FOR TAXES FOR THE YEAR 1917 UPON THE EXPIRATION OF FIVE YEARS FROM THE FILING OF THE 1917 RETURN.

Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) provides in part as follows:

> "The amount of income, excess profits, or war profits taxes due under any return * * * made under prior income excess profits, or war profits tax acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and col-

lection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess profits, or war profits tax acts * * * shall be begun after the expiration of five years after the date when such return was filed."

The above provision was before this Court in the case of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, and in *Russell* v. *United States*, 278 U. S. 181, Section 277 (a) (2) of the Revenue Act of 1924 (43 Stat. 299) was construed.

In *Wood* v. *Carpenter*, 101 U. S. 135, the court said at page 139:

> "Statutes of Limitation are vital to the welfare of society and are favored in the law. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation."

With reference to Section 250 (d) of the Revenue Act of 1921, when it was offered by the Ways and Means Committee Mr. Hawley, speaking for the Committee, said (Congressional Record, Vol. 61, page 5201):

> "A great many business transactions are suspended and are not consummated for the reason that the person intending to buy says: 'What liabilities are there on this property?' And, among others, there is stated to be a certain amount of tax in dispute. Men do not like to buy property, especially when the amount of tax in dispute is large. Many very important transactions have been lost, and this will open up the way to their settlement."

The construction of general Statutes of Limitations by the old common law as merely barring the remedy and not extinguishing the liability has lead to very unsatisfactory results. If a statute was a mere bar of the remedy by voluntarily making even a partial payment after it had run one was held to have waived its bar (*Cross* v. *Allen*, 141 U. S. 528) and a multitude of other claims of

waiver arose. For a long time the Treasury Department claimed that the filing of an amended return was a waiver of the statute.

In *Davis* v. *Mills*, 194 U. S. 450, at page 454, this Court said:

> "It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. *But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued.* The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.*" (Italics ours.)

See also *The Harrisburg*, 119 U. S. 199, and particularly *William Danzer & Co.* v. *Gulf Railroad Co.*, 268 U. S. 633 and authorities therein cited.

The general rule of law that a liability not grounded on contract or existing at common law but founded entirely on a statute, takes the Statute of Limitations with it as a part of the liability and when the limitation has run the liability is gone, is alone sufficient to establish this contention. (37 Corpus Juris, Section 51, page 732; 17 Ruling Case Law, Section 318, page 952; Wood, Limi-

tation of Actions, 2nd ed. page 35; Buswell, Limitations, Section 351.) It has been suggested that if the limitation is contained in a subsequent statute that rule does not apply, but this Court, in *Davis* v. *Mills*, 194 U. S. 450, at page 454, disposed of that contention in the quotation heretofore set forth in which it said:

> "The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

Taxes are within the above rule because, as said by this Court in *Meriwether* v. *Garrett*, 102 U. S. 472, at p. 513:

> "Taxes are not debts. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government or for some special purpose authorized by it."

Taxes are solely created by statute and in the absence of a statutory liability for them no liability exists. Being purely statutory creations a special statutory limitation on their collection is within the now firmly established rule that when limitations on the enforcement of statutory liabilities expire the liability expires with them.

Furthermore, the various sections of the Revenue Act dealing with limitations are in *pari materia* and the intent of Congress must be ascertained by considering them together. This rule has been frequently stated by this Court and it has been applied in construing Revenue laws. (*Converse* v. *United States*, 21 How. 436, and see *United States* v. *Ewing*, 237 U. S. 197, 200; 25 R. C. L. Section 288, page 1064.) In construing Section 250 (d) with respect to waivers it was applied by the Court of Appeals for the District of Columbia in *Joy Floral Company* v. *Commissioner of Internal Revenue*, 29 F. (2d) 865, wherein the court quoted Chief Justice Marshall.

A consideration of the provisions of the various Revenue laws dealing with this subject makes it clear beyond a doubt that Congress intended to extinguish the liability.

By Section 1106 (a) of the Revenue Act of 1926, (44 Stat. 113) Congress provided in part that the bar of the Statute of Limitations should extinguish the liability. The legislative history set forth in this brief on pages 34 to 40 conclusively shows that Congress considered it to be merely declaratory of pre-existing law.

Section 250 (d) of the Revenue Act of 1921 has been construed not only to bar the remedy but to extinguish the liability in *Bashara* v. *Hopkins*, 290 Fed. 592 (Aff'd. 295 Fed. 319; Certiorari denied 265 U. S. 584), *Citizens Bank* v. *Miller Link Lumber Company*, 16 Fed. (2d) 163, and in *United States* v. *John Barth Company*, 27 Fed. (2d) 782 (reversed on other grounds in 279 U. S. 370). The only construction to the contrary which we have been able to find was that in the case of *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, which the Ways and Means Committee in its report stated was contrary to the rule expressed by this Court in *Graham* v. *Du Pont*, 262 U. S. 234. The reversal of the decision in the Toxaway Mills case by this Court in 273 U. S. 781, amounted to a decision that the Statute extinguished the liability.

As a matter of actual practice Section 250 (d) did not effectually bar the remedy because the Collector of Internal Revenue could issue a distraint warrant and collect the tax after the Statute of Limitations had run. The taxpayer could not prevent him by injunction. The substantial thing which the Statute of Limitations gave the taxpayer was an affirmative action to recover the tax after its payment. This is not true of Statutes of Limitations which merely bar the remedy. They cannot be made the basis of an affirmative action. Under those

statutes it seems that if the debtor pays the debt the creditor can keep it.

Section 250 (d) of the Revenue Act of 1921 is not a general Statute of Limitation but is a special Statute contained in a taxing act and an integral part of the Revenue laws and is, therefore, within the rule laid down in *William Danzer & Co., Inc.* v. *Gulf & S. I. R. Co.* 268 U. S. 633; *Morgan's Louisiana & Texas Railroad & S. S. Co.* v. *Cooke,* 273 U. S. 656; and *Peninsula Produce Exchange* v. *New York P. & N. R. R. Co.* 152 Md. 594, 137 Atl. 350; Aff'd. 275 U. S. 599.

It has been setled that the principle announced in these cases is equally applicable to the government—that is to say, the United States may set up against itself a statute of limitations in such language as to extinguish absolutely its right after the expiration of the period fixed. See *United States* v. *Chandler-Dunbar Company,* 309 U. S. 447; *Winona & St. Peter Railroad Co.* v. *United States,* 165 U. S. 483; and *United States* v. *Jones,* 218 Fed. 273.

In *Russell* v. *United States,* 278 U. S. 181, this Court said that the taxpayers "would be *free from liability under the five year limitation* in the Act of 1918, continued by the Act of 1921". And again that the construction of Section 278 contended for by the government "would extend for some five years a liability which had almost expired".

Another distinction between general statutes of limitation and special statutes of limitation contained in a taxing act is that general statutes of limitation are construed strongly in favor of the government, whereas special statutes of limitation contained in a taxing act are construed liberally in favor of the taxpayer. This distinction was recognized by this Court in *United States* v.

Updike, 281 U. S. 489, at page 496, and particularly in *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, at page 349.

Since the Statute of Limitations contained in Section 250 (d) of the Revenue Act of 1921 extinguished the taxpayer's liability and the provision to this effect contained in Section 1106 (a) of the Revenue Act of 1926 was merely declaratory of pre-existing law, there is no basis for the distinction which the Court of Claims draws between payments made prior to the enactment of the Revenue Act of 1926 and payments made thereafter. It has made this distinction in the case of *Taft Woolen Company*, 38 Fed. (2d) 699, on the one hand, and *Wyman Partridge Company*, 41 Fed. (2d) 886, on the other, all of which are now pending herein on certiorari. So far as we are aware no other Court has made this distinction.

VII.

SECTION 611 IMPOSES NO TAX NOR DOES IT RATIFY THE COLLECTION OF A TAX.

Two cases which have been misapprehended by those courts which have decided the question herein involved in favor of the government are the cases of *United States* v. *Heinszen & Co.* 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.* 257 U. S. 226.

As pointed out in the petition for the writ, the decision in the Heinszen case was made over the dissent of two Justices, one did not participate and Mr. Justice Harlan in his specially concurring opinion seems to intimate that he might have thought otherwise had the suit been brought against the Collector and not against the United States.

The majority opinion in the prior case of *De Lima* v.

Bidwell, 182 U. S. 199, had said that such an act would be beyond the power of Congress.

It is respectfully submitted that the Heinszen and Rafferty cases have no bearing on the case at bar.

In those cases there was a clear and explicit ratification of the collection of the duties in "words from which there was no escape." It was sustained in the Heinszen case on the theory that it was "but an exercise of the conceded power dependant upon the law of agency to ratify an act done on behalf of the United States, which the United States could have originally authorized".

If the United States could have originally authorized the collection of taxes from people in the situation set forth in Section 611, which we deny for the reasons hereinafter stated, then if Section 611 is a ratification of the act of the Collector in collecting the taxes, it makes the collection legal and these cases relied upon by the government apply.

It is submitted that when the rules for the construction of tax statutes are applied to Section 611 and even without invoking their application the opinion of the court in *Bessemer Coal & Coke Company* v. *Heiner*, 39 Fed. (2d) 492, in which it is said:

> "There are no words in the Act which can clearly be construed as a ratification of the collection of a tax which was barred by the Statute of Limitations at the time it was paid"

is eminently sound.

In the Heinszen and Rafferty cases it was not even argued and it could not have been argued that the Acts of Congress there involved did not ratify the collection. They expressed an intention so to do "in words from which there was no escape". In the Heinszen case the Act of Congress provided:

> "That the tariff duties * * *, are hereby legalized

and ratified, and the collection of all such duties * * * is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The ratifying Act in the Smith, Bell & Company case provided that:

"The taxes imposed by the Philippine legislature * * * are legalized and ratified, and the collection of all such taxes made under or by authority of such Act * * * is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The history of those cases discloses that Congress passed several Acts before it passed one sufficiently explicit to accomplish ratification, and even after the decision in the Heinszen and Rafferty cases this Court in *McLeod* v. *United States*, 229 U. S. 416, refused to apply it to a situation not within "the exact and literal meaning of the words".

It will be a far-fetched construction and will be casting all fixed rules for the construction of tax laws to the winds to say that Section 611 ratified the collection of a tax. It merely declares that under the circumstances stated the collection shall not be an overpayment under the provisions of Section 607 and Section 607 purports to ratify nothing. Had Congress desired to ratify anything it could easily have adopted words sufficiently explicit to do so. Indeed, it is presumed to have passed this legislation with a knowledge of the prior decisions of this Court and it is presumed to have been cognizant of the necessity for explicit ratification before it would be held to have ratified any Act which was illegal at the time it was done. Therefore the Heinszen and Rafferty cases are not in point.

Indeed, the reason all doubts are to be resolved in favor of the citizen and against the government in tax matters is that Congress is always at hand to amend the law and if it is not unequivocal and specific enough Congress can make it more specific if it desires to do so.

Manifestly, Section 607 imposes no tax, and Section 611 imposes no tax, because while it applies to payments voluntarily made within one year after its enactment, yet it does not purport to compel anyone to pay, which would have been the case had it imposed a tax.

We do not think respondent will contend that Sections 607 and 611 impose a tax. If he contends that they ratify the collection of a tax certainly no support for this contention can be spelled out of the exact and literal meaning of the words and this Court in the past has repeatedly refused to imply a ratification from much stronger language.

If respondent, finding no support in "the exact and literal meaning of the words" of Section 611 for either of these contentions does not make them then he will be forced to claim that Section 611 merely provides that monies illegally collected shall be retained in the Treasury under the circumstances specified. It seems that this is the utmost extent to which a construction of Section 611 can go. Indeed, from the report of the House Conferees who were responsible for Section 611, which report is set out at page 11 of this brief, it seems that *all they intended to do by it and all they thought it did was to make a "prohibition upon refunds".*

If that is all it does then the reversal of this judgment was erroneous because no error occurred up to and including the time of its rendition. Petitioners had a personal judgment against the Collector for his illegal act and no reason appears in this record (no certificate of

probable cause) why they could not have collected it from him even if the United States does keep the fruits of his illegal exaction. The matter is purely a personal matter between petitioners and the Collector and as said in *Sage* v. *United States*, 250 U. S. 33, at page 37:

> "At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

In the case at bar it does not appear that the United States has any kind of interest in this judgment. So far as the record is concerned the United States is a total stranger to it.

Even in cases where certificates of probable cause are issued they do not render the judgment invalid but merely concern the source from which it is or is not collectible.

But if Section 611 imposes no tax and ratifies the collection of no tax but merely provides that monies illegally collected shall be retained by the United States then it is obviously unconstitutional because it simply confiscates such monies and appropriates private property to public use without just compensation and without due process of law.

The title to monies collected by duress has never passed out of the plaintiff any more than the title to land passes out of one from whom a deed purporting to convey it is taken by duress and a provision that such monies shall be retained in effect provides "such monies are hereby confiscated".

VIII.

EVERY COURT WHICH HAS CONSIDERED THE QUESTION TO DATE HAS DECIDED THAT CONGRESS HAVING EXTINGUISHED A LIABILITY HAS NO POWER TO REVIVE THE SAME.

So far as we have been able to find, every court to which the question has been presented has held that where Congress has extinguished a tax liability it has no power to revive the liability. These decisions are the decision of the Third Circuit in the case of *Dobbins* v. *Commissioner*, 31 F. (2d) 935; the decision of the Seventh Circuit in *United States* v. *John Barth Co.* 27 F. (2d) 782 (reversed on other grounds in 279 U. S. 370); of the Court of Claims in *Wyman, Partridge & Co.* v. *United States*, 41 F. (2d) 886; of the Supreme Court of Pennsylvania in *Wettengel* v. *Robinson*, 289 Pa. 525; 136 Atl. 673; also of several District Courts in the following decisions: *Pepsin Syrup Co.* v. *Schwanner*, 35 F. (2d) 197 (Ill.); *Southern Lumber Company* v. *United States*, ____ F. (2d) ____ (D. C. Arkansas), and of the Board of Tax Appeals in *Peerless Woolen Mills*, 13 B. T. A. 1119.

The courts are unanimous and no court has dissented from this proposition. The solitary judge to express dissent is Judge Littleton in his specially concurring opinion in the case of *Wyman, Partridge & Co.* v. *United States*, 41 F. (2d) 886, wherein he says that the limitations of the due process clause which exist between individuals do not exist in matters of taxation. This is contrary to the view expressed by him when he was chairman of the Board of Tax Appeals in *Peerless Woolen Mills*, 13 B. T. A. 1119, at pages 1131 and 1132.

It is submitted that all the limitations of the due process clause applicable to individuals should be applicable to the government. The Constitution does not

contain any exception in favor of public officers. The Constitution would probably not have been adopted except for the assurance that the due process clause would be subsequently added. At the time it was adopted the people were democratic in thought. It was considered that public officers were public servants and for that reason should and would be subject to all the constitutional limitations which applied to the dealings of one of the masters of these public servants with another. It was never thought that in a government "of, by and for the people" the distinctions and precedents concerning the powers and sovereignty of a government which existed in a monarchial country where public officers were public masters and not public servants would be applied to the construction of our Constitution. If it had been so thought it would not have been adopted. The people having recently suffered from the encroachments by way of taxation of the King's government wanted protection against the new one they were setting up.

If Section 611 is construed as contended for by the government, when all technical distinctions are brushed aside the result will be to go back for years and reimpose a liability which had been extinguished by legislation. This situation was not present in the Heinszen and Rafferty cases. In those cases no liability had been extinguished and was sought to be again reimposed, and in this respect those cases are distinguishable from the case at bar and the rule laid down in *William Danzer & Co. Inc.* v. *Gulf & Ship Island R. R. Co.* 268 U. S. 633 *and the cases therein cited.*

A rule applicable in cases where the remedy is not merely barred but the liability extinguished is stated in the textbooks and is expressed in the article on Limitation of Actions in 17 R. C. L. Section 15 at page 674, as follows:

"One who has become released from a demand by

the operation of the statute of limitations is protected against its revival by a change in the limitation law, the defense in such case being considered a vested right or property, which cannot be taken away by legislation, or even by the action of a constitutional convention, attempting to revive the cause of action either by repeal of the statute or by affirmative act."

IX.

IF SECTION 611 IS CONSTRUED AS CONTENDED FOR BY THE GOVERNMENT IT FURTHER VIOLATES THE FIFTH AMENDMENT BECAUSE IT IS UNREASONABLE AND ARBITRARY.

Section 611 is admittedly ineffective and inapplicable if we substitute in it the words "claim for credit" for the words "claim in abatement". The Treasury Department in G. C. M. 6296, published in Internal Revenue Cumulative Bulletin VIII-2, at page 152, concedes that it has no application to cases in which claims for credit were filed.

Claims for credit and claims in abatement were handled in and operated in precisely the same way. The only distinction between them was the square in which the taxpayer made an "X". In order that the Court may visualize this argument the form used for these claims is contained at the end of this brief at page 72.

If your Honors will look at this you will observe that it becomes a claim for credit or a claim in abatement according to the square in which the taxpayer places an "X". So far as any possible delay of the collection of the tax is concerned it must be admitted by the government that a claim for credit operated in precisely the same way as a claim in abatement. If anything, the morals of the situation is stronger in cases where the abatement claim was filed because in such cases the taxpayer usually had a ground to contest the tax, whereas

in cases of credit claims he was not contesting the tax but was claiming that an overpayment for another year should be applied against an admitted tax liability.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, this Court said at page 240:

> "A classification for purposes of taxation must rest on some reasonable distinction".

Have we come to a time in this country when whether thousands of dollars are to be given to one man or withheld from another under our tax laws may under our Constitution depend upon the square in which he puts an "X"? Is a classification depending upon an "X" reasonable? If so, what kind of classification is unreasonable?

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court said at page 542:

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment".

If Congress had attempted to impose for the first time a tax limited to the special class of taxpayers who are within and based upon distinctions as insubstantial as those made by Section 611 it can hardly be believed that it would be sustained. The observation of this Court in *Forbes Boat Line* v. *Commissioners*, 258 U. S. 338 at page 339 is applicable:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States* v. *Heinszen & Co.* 206 U. S. 370; (*Rafferty* v. *Smith, Bell & Company*, 275 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be

> imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner* v. *Baltimore*, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act".

Under the respondent's construction of Section 611 people who filed abatement claims and by one means or another succeeded in delaying the collection of the tax until the enactment of the Revenue Act of 1928 are not compelled to pay. In other words, the longer a taxpayer succeeded in delaying the collection of the tax the more is he favored. The taxpayer who was prompt and paid quickly is sought to be penalized. The taxpayer who skulked and delayed is rewarded.

The taxpayer who filed a claim in abatement and who was within the respondent's construction of Section 611 but who paid the tax and brought a court action and recovered before the enactment of the Revenue Act of 1928 may keep the money, and finally, even where the exact situation prescribed in Section 611 does exist, the taxpayer who pays more than one year after the enactment of the Revenue Act of 1928 may recover his money.

The ex-*post facto* character of Section 611 and its impairment of the Collector's implied contract to repay the money are not to be left out of consideration in determining the question of reasonableness. There may be things, any one of which standing alone would not operate to make a law invalid but the combination may be such as to render it arbitrary and capricious.

In *Forster* v. *Forster*, 129 Mass. 559, the court, speaking through Chief Justice Grey, later an associate Justice of this court, held a statute unconstitutional which

made a far more reasonable classification than does the one in the case at bar.

Section 611 is further objectionable because it denies to taxpayers equal protection of the laws and as said in *United States* v. *Yount*, 267 Fed. at page 861:

> "It seems reasonably clear that the 'due process of law' provisions of the Fifth Amendment is broad enough in its scope and purpose to include 'the equal protection of the laws' which no State may deny to any person under the provisions of the Fourteenth Amendment."

No case has gone so far as to hold that Congress may deprive a party of all remedy for a wrongful act. The Heinszen and Rafferty cases did not so hold. In those cases the act was ratified and expressly made legal and consequently there was no wrong for which any remedy could be sought.

It is beside the point to say that Congress may alter or modify a remedy or substitute an administrative for a judicial remedy. No remedy is here involved. As said by the court in *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, at page 384:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury."

In the case at bar at the time this suit was brought the petitioners had an acknowledged claim against the respondent and a clear right to recover a judgment against him.

This court has also said:

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or *deprive one of a vested*

property right. If the changing or repealing statute *leaves the parties a substantial remedy the legislature does not exceed its authority.* Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. * * * The right to compensation was a vested property right." (Italics ours) *Ettor* v. *Tacoma,* 228 U. S. at p. 155, 156 and 158; *Smallwood* v. *Gallardo,* 275 U. S. 56; 48 S. Ct. 23.

In *Pritchard* v. *Norton,* 106 U. S. 132, this court said:

"A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the legislature to take it away."

In *Gilbert* v. *Ackerman,* 159 N. Y. 118, the Court of Appeals of the State of New York stated the rule as follows:

"The right possessed by a person of enforcing his claim against another is property and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law."

In the case of *Angle* v. *Chicago etc. Railway Company,* 151 U. S. 1, 19, this court said:

"A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

It seems obvious that if an individual should rob your Honor upon the steps of the capitol the legislature could not pass an act granting him immunity. In the case at bar the Collector illegally and wrongfully took the plaintiff's property. It is said that an act has been passed granting him immunity. If so the act can only be sustained by making distinctions in tax cases which are not applicable to other cases. The necessity of the situation does not demand that any such distinction be made. Such distinctions were not contemplated when the Constitution was adopted and revenue may be easily raised in other ways without grafting such distinctions upon the law.

For all or any of the foregoing reasons and many more which will doubtless occur to your Honors out of the abundance of your experience and the fullness of your wisdom the decision of the Circuit Court of Appeals should be reversed and the decision of the District Court affirmed.

All of which is respectfully submitted.

JOHN E. HUGHES,
Counsel for Petitioners.

Chicago, November 5, 1930.

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☐ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

TREASURY DEPARTMENT
Internal Revenue Service
Form 843 (Rev. 1955)
Complies Treasury T. D.
January 31, 1955

IMPORTANT
No suit, Collector of Internal Revenue where assessment was made, has acquisition unless claim is filed in.

COLLECTOR'S NOTATION
District
Amount number
Date received
Signature
Collector of Internal Revenue

State of _____ } ss:
County of _____ }

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Signature

(Name of taxpayer or purchaser of stamps.)

TYPE OR PRINT

(Residence—give street and number as well as city or town and State.)

(Business address.)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From:	19
To:	19

1. Business in which engaged _____
2. Character of assessment or tax _____
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased _____ $ _____
4. Reduction of Tax Liability requested (Income and Profits Tax) _____ $ _____
5. Amount to be abated _____ $ _____
6. Amount to be refunded (or such greater amount as is legally refundable) _____ $ _____
7. Date of payment (see Collector's receipts or indorsements of canceled checks) _____
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed _____
9. District in which unpaid assessment appears _____
10. Amount of overpayment claimed as credit _____ $ _____
11. Unpaid assessment against which credit is asked; period from _____ to _____ $ _____

Deponent verily believes that this application should be allowed for the following reasons:

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this _____ day of _____, 19____

Signed: _____

_____
(Title.)